

CITY OF CINCINNATI <i>ex rel.</i> THOMAS E. BRINKMAN, Jr., <i>et al.</i> ,  Relators,  v.  CITY OF CINCINNATI, et al.,  Respondents.	: : : : : : : : : :	Case No. A-13-_____  Judge _____         <b>RELATORS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION</b>
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## BACKGROUND

On March 6, 2013, the Cincinnati City Council passed, by a vote of 5-4, Ordinance No. 56-2013 which authorized the City Manager “to execute a Long-Term Lease and Modernization

Agreement for the City of Cincinnati Parking System with the Port of Greater Cincinnati Development Authority” with said Long-Term Lease and Modernization Agreement “in substantially the form attached” to the Ordinance. Following passage of Ordinance No. 56-2013, residents and voters within the City of Cincinnati commenced a petition effort to subject the Ordinance to a vote of the people of the City of Cincinnati. During the ensuing 30-day period, over 19,893 signatures were obtained seeking to subject Ordinance No. 56-2013 to referendum.

However, failing to appreciate and recognize that, “[u]ltimate sovereignty, as far as the [municipality] is concerned, rests in its people, and as long as the government established by them exists, that sovereignty remains with them, except insofar as they have expressly surrendered it to a higher sovereignty,” *Williams v. City of Columbus*, 33 Ohio St.2d 75, 85, 294 N.E.2d 891 (1973), officials with the City of Cincinnati maintained and asserted that Ordinance No. 56-2013 was not subject to referendum. Thus, in order to protect their right of referendum that was expressly reserved to the people pursuant to the Charter of the City of Cincinnati, certain voters within the City of Cincinnati commenced litigation in the Hamilton County Court of Common Pleas to protect that right.

Ultimately, on March 28, 2013, the Hamilton County Court of Common Pleas, in the case styled *McQueen v. Dohoney*, Case No. C-13-01595, issued a permanent injunction whereby the Court restrained the City of Cincinnati and its City Manager from taking further action to implement Ordinance No. 56-2013, including the execution of the Lease Agreement authorized by Ordinance No. 56-2013, pending the outcome of the referendum process. Subsequently, the City of Cincinnati appealed the permanent injunction to the Hamilton County Court of Appeals in a case styled *McQueen v. Dohoney*, Case No. A-13-00196. On June 12, 2013, in *McQueen v. Dohoney*, the Hamilton County Court of Appeal reversed the judgment of the Hamilton County

Court of Common Pleas and remanded the case with instructions to enter judgment in favor of the City of Cincinnati.

Following the pronouncement by the Hamilton County Court of Appeal of its decision in the *McQueen* case, the Cincinnati City Manager issued a public statement wherein he declared “The City will sign the Parking Lease and Modernization Plan with the Port of Greater Cincinnati upon the trial court signing the actual orders.” Ultimately, on June 17, 2013, the Hamilton County Common Pleas Court entered an order dissolving the permanent injunction and entering judgment in favor of the City of Cincinnati. And that same day, the City Manager of the City of Cincinnati executed a modified version of the Lease Agreement.

However, the other party to the Lease Agreement, the Port of Greater Cincinnati Development Authority, also wanted to have other changes made to the Lease Agreement before it would sign the Agreement. Ultimately, though, on June 21, 2013, the City of Cincinnati and the Port Authorized signed a Lease Agreement, though not the Lease Agreement which the Cincinnati City Council authorized pursuant to Ordinance No. 56-2013.

A comparison between the modified Lease Agreement which was executed on June 21, 2013, and the Lease Agreement which the Cincinnati City Council authorized pursuant to Ordinance No. 56-2013 reveals the following material differences:

<b>Lease Agreement authorized by Ordinance No. 56-2013</b>	<b>modified Lease Agreement as signed by City Manager on June 17, 2013</b>
<i>Section 2.3(b):</i>  If, by June 30, 2013, the Underwriter fails to deliver a Bond Purchase Agreement executed by it to the Port Authority . . . , then the City shall be entitled to immediately terminate this Agreement . . .	<i>Section 2.3(b):</i>  If, within 90 days of receipt of an unqualified opinion of counsel to the City (that remains continuously in full force and effect) to the effect that the Parking System Ordinances are then effective, the Underwriter fails to deliver a Bond Purchase Agreement executed by it to

	the Port Authority . . . , then the City shall be entitled to immediately terminate this Agreement . . . ; provided further, however, that such 90 day period may be extended if, in the reasonable judgment of the Port Authority, the Parking Bonds (or similar revenue bonds supported by parking revenues from a large urban parking system) cannot be marketed to sophisticated institutional investors for reasons other than a delay caused by the action or inaction of the Port Authority.
<p><i>Section 2.4(d)(v):</i></p> <p><i>No such provision.</i></p>	<p><i>Section 2.4(d)(v):</i></p> <p>This Agreement may be terminated at any time prior to the Closing: . . . (v) by the Port Authority, upon notice to the City and following an engineering study conducted by the Port Authority of the Parking System, if the Port Authority, in the exercise of reasonable due diligence, discovers any facts which, in the Port Authority's sole judgment, would materially and adversely affect the ability of the Port Authority to perform its obligations under Agreement in a manner that is consistent with the Port Authority's obligations to the Cincinnati and Hamilton County community; provided, such notice is given to the City within seventy-five (75) days of the date of execution of this Agreement by both Parties;</p>
<p><i>Section 2.4(d)(vi):</i></p> <p><i>No such provision.</i></p>	<p><i>Section 2.4(d)(vi):</i></p> <p>This Agreement may be terminated at any time prior to the Closing: . . . (vi) by the Port Authority, upon notice to the City, if the Port Authority is not satisfied with Transaction for any reason; provided, such notice is given to the City within thirty (30) days of the date of execution of this Agreement by both Parties.</p>

Generally speaking, the change made to the Lease Agreement concerned the timing and conditions under which the Agreement could be terminated. No action by the Cincinnati City

Council authorized any changes or additional terms to the Lease Agreement, especially one that significantly modified the City's right to terminate the Agreement.

## ARGUMENT

The Cincinnati City Council authorized an agreement whereby the City could terminate the Lease Agreement on or after a date certain, *i.e.*, June 30, 2013, if a bond purchase agreement had not been executed or delivered. But instead of retaining that express right of termination, including a date certain, the modified Lease Agreement that was signed on June 21, 2013, completely changed the right of the City to terminate the Agreement. For under the modified Lease Agreement which was signed on June 21, 2013, the City's right to terminate the Lease Agreement doesn't arise on a date certain but, instead is a floating date that is further subject to indefinite extensions by the Port Authority. Clearly, such a change – which diminishes a right of the City – constitutes a significant and material change in the Lease Agreement that the Cincinnati City Council authorized. And, in signing the modified Lease Agreement, the Cincinnati City Manager exceeded the authority granted to him by Ordinance No. 56-2013.

“Where one of the parties is a municipal corporation, contract formation or execution may only be done in a manner provided for and authorized by law.” *Ohio Power Co. v. Village of Mingo Junction*, 2004-Ohio-4994 ¶8; *accord Percy Squire Co., L.L.C. v. Youngstown*, 2005-Ohio-6442 ¶17 (“[w]here one of the parties to a potential contract is a municipal corporation, the contract formation or execution may only be done in a manner provided for and authorized by law”). Thus, “contracts, agreements, and/or obligations of a municipality must be made and entered into in the manner provided for by statute or ordinance and cannot be entered into

otherwise.” *Id.*; accord *Wellston v. Morgan*, 65 Ohio St. 219 (1901) (syllabus ¶1)(“[p]ersons dealing with officers of municipalities must ascertain for themselves and at their own peril that the provisions of the statutes applicable to the making of the contract, agreement, obligation, or appropriation have been complied with”).

“[I]n contract law, an agent’s authority to contract on behalf of its principal is ordinarily limited to the scope of the authority granted by the principal.” *State v. Billingsley*, 133 Ohio St.3d 277, 978 N.E.2d 135, 2012-Ohio-4307 ¶26 (2012). And “[s]ome courts have even resolved that the state is not bound by the contract of a public agent which was not specifically authorized, although it related to a subject within the general scope of his powers.” *Foe Aerie 2177 Greenville v. Ohio State Liquor Control Comm’n*, 2002-Ohio-4441 (quoting *State v. The Lake Shore & Michigan Southern Railway Co.*, 2 Ohio Dec. 300 (1895).

Thus, “[p]ersons seeking to enter into a contractual relationship with a governmental entity are on constructive notice of the statutory limitations on the power of the [entity] agent to contract.” *In re Ford*, 2006-Ohio-6530 ¶16 (quoting *Shampton v. Springboro*, 98 Ohio St.3d 457, 2003-Ohio-1913, 786 N.E.2d 883 (2003). For a person seeking to contract with a government, “must ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril.” *Lathrop Co. v. Toledo*, 5 Ohio St.2d 165, 172-173 (1966).

In this case, the Cincinnati City Council granted its City Manager the authority to enter into a Lease Agreement “substantially in the form” of the version attached to Ordinance No. 56-2013. Yet, the version that the City Manager signed and under which the City of Cincinnati and the Port Authority are presently proceeding significantly, *i.e.*, materially, changed the termination provisions.

Under the Lease Agreement authorized by the Cincinnati City Council, the City of Cincinnati could unilaterally terminate the Lease Agreement on or after June 30, 2013; the only conditions precedent were the passage of the date specific, *i.e.*, June 30, and the lack of a bond purchase agreement. In a sharp departure from the Lease Agreement actually signed by the City Manager, the City of Cincinnati no longer retains the right to terminate the Lease Agreement based only upon those two conditions. Instead, the City Manager exceeded the authority given to him by Ordinance No. 56-2013 when he signed a Lease Agreement that no longer gave the City the right to terminate the Lease Agreement on or after June 30, 2013 if there was no bond purchase agreement by that date; instead, the City's right to terminate the Lease Agreement doesn't even arise until (i) the City Solicitor gives an unqualified opinion that Ordinance No. 56-2013 is effective; (ii) 90 days have passed since the City Solicitor gives that unqualified opinion; and (iii) there is no bond purchase agreement. Additionally, pursuant to the Lease Agreement signed by the City Manager, even after City Solicitor gives an unqualified opinion that Ordinance No. 56-2013 is effective, the 90-day period in which the Port Authority must provide a bond purchase agreement can be extended indefinitely by the Port Authority.

In essence, the City Manager and the Port Authority have sought to change and circumvent the limitation on the authority that the Cincinnati City Council granted when it enacted Ordinance No. 56-2013. But as the First District recognized in a comparable situation involving a state agency, "the law is clear that a state agency has only such authority as specifically conferred by statute. . . . A state agency cannot expand its powers and circumvent legislative intent by obtaining the voluntary consent of contracting parties. Such an action could result in unequal application of the law and violate public policy." *State ex rel. DeWine v. Mass Realty, L.L.C.*, 197 Ohio App.3d 653, 968 N.E.2d 558, 2012-Ohio-146 ¶20. In this case, the

action of the City Manager of exceeding the authority given to him by Ordinance No. 56-2013 when he signed the modified version of the Lease Agreement with the Port Authority was nothing more than that which the First District declared was clearly against public policy and impermissible.

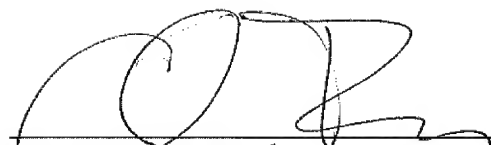
As the foregoing demonstrates, the City of Cincinnati has clearly engaged in or threatens to engage in an abuse of its corporate powers and/or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinances governing it. Thus, the equities militate strongly in favor of the issuance of the requested temporary restraining order and preliminary injunction. *See Battelle Mem. Inst. v. Big Darby Creek Shooting Range*, 192 Ohio App.3d 287, 2011-Ohio-793 ¶21 (factors to be considered in ruling on a motion for a preliminary injunction include whether (1) the movant has shown a substantial likelihood that it will prevail on the merits of its underlying substantive claim, (2) the movant will suffer irreparable harm if the injunction is not granted, (3) the preliminary injunction would harm third parties, and (4) the public interest will be served by the injunction). For the illegality alone of the modified Lease Agreement signed on June 21, 2013, should convince this Court to issue such relief. Otherwise, by allowing the City of Cincinnati to proceed forward with a clearly illegal contract which was entered into through the *ultra vires* action of a city official, the municipal corporation, as well as the taxpayers of the City, have has and will continue to suffer irreparable injury through on-going activities in support of such an illegal contract. For there can be no public interest to allowing an illegal contract to proceed forward. *See General Motors Acceptance Corp. v. Mercure*, 2007-Ohio-5708 ¶31 (positively recognizing New York law that “a court of its own motion will deny the right to any relief under an illegal contract contrary to public policy, even without reference to the state of the pleadings, whenever it



becomes apparent that such agreement is antagonistic to the public interest and welfare” (quoting *Blumenberg v. Neubecker*, 191 N.E.2d 269 (N.Y. 1963)). And while the Port Authority may desire the modified Lease Agreement proceed forward, the evidence clearly establishes that the Port Authority was not only complicit but actively participated in the effort to change the terms and conditions of the Lease Agreement approved by the Cincinnati City Council via Ordinance No. 56-2013; the Port Authority comes to equity with unclean hands. Additionally, as noted above, “[p]ersons seeking to enter into a contractual relationship with a governmental entity are on constructive notice of the statutory limitations on the power of the [entity] agent to contract.” *In re Ford*, 2006-Ohio-6530 ¶16. The Port Authority knew or should have known what the Cincinnati City Council authorized pursuant to Ordinance No. 56-2013; the fact that the City Manager exceeded his legal authority can provide no solace to the Port Authority.

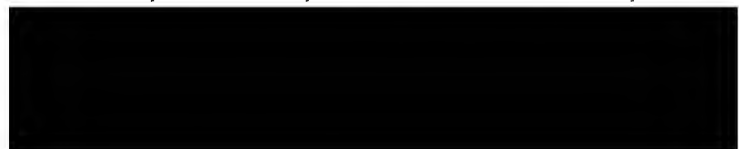
In considering whether to issue a preliminary injunction, “[n]o one factor is dispositive as the court balances the equities involved.” *Martin v. Lake Mohawk Property Owner’s Ass’n*, 2005-Ohio-7062 ¶36. But in this case, the equities all favor the issuance of a temporary restraining order and preliminary restraining the City of Cincinnati, as well as its officials or officers, or others acting at their direction or in concert with them, from undertaking any actions whatsoever in support of or otherwise performing or complying with the modified Term Lease and Modernization Agreement between the Respondents and signed on June 21, 2013, unless and until the City Council of the City of Cincinnati expressly authorizes the terms and conditions of said modified Long-Term Lease and Modernization Agreement.

Respectfully submitted,

  
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### **CERTIFICATE OF SERVICE**


I certify that a copy of the foregoing was or will be served via hand delivery upon the following this 3<sup>rd</sup> day of September, 2013.

John Curp  
City Solicitor, City of Cincinnati



Paula Boggs Muething  
General Counsel, Port of Greater



  
Christopher P. Finney (0038998)